



HOW TO GET SUED BY YOUR EMPLOYEES

LET ME COUNT THE WAYS

BY JACK GARSON

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How can you get sued by your employees? Easy. Use common sense, go with your gut, or — my personal favorite — do what other companies are doing. None of these will protect you from the hundreds of laws out there regulating how you treat employees. Apple employees just sued to be paid for time they wait in line after their shifts to be searched for possible stealing. Fox Searchlight recently lost a lawsuit to movie studio interns who weren't paid at all. Paula Deen was sued for alleged racial discrimination and sexual harassment. Even dismissal of that case couldn't save Deen from vast harm. Sometimes employers use bad judgment and deserve to be sued. But often the problem is complex, counterintuitive laws that are ever so easy to violate.

Take the Apple case, for example. A recent lawsuit alleges that Apple failed to pay certain store employees for time they worked. Sounds like an easy question. Either they worked or didn't, right? But in this case, the "work" was time employees spent waiting to have their bags and backpacks searched for employee theft. Because we all know that the customers come first, these were not short lines. Apple allegedly required these employees to stick around for an extra 50 to 90 minutes per week but didn't pay for this time.

The question of what constitutes work time — for which employees should be paid — has been around for a while and has become increasingly complicated. In the past, employees won compensation for the time they spent putting on special gear before their shifts began and completing time cards after they ended. Now, in our 24/7 world, where employees are tethered to the office by smartphones, some employees are suing to be paid for "off-duty" time when they are required to monitor emails and texts. Things were simpler when employees showed up at the factory at dawn and left at dusk.

Then there is the whole intern fiasco. Most companies treat their interns like entry-level employees who are supposed to make photocopies and answer phones — but without the paycheck part. However, legit intern programs must follow a strict set of rules. First and foremost, interns programs are supposed to be educational and provide training. FYI, getting coffee — despite the rigors of nailing everyone's latte order — is not considered educational. Second, interns can't be used as free help who replace what otherwise would be paid positions. So, if you would normally pay someone to do a particular job, you can't fill that position with an unpaid intern. Understand, however, that if you do pay your interns or, alternatively, you actually train them for a given profession, you are not only doing the right thing but

complying with the law. Also — and now don't get all excited — but I think there is some special award coming your way.

Then there is the issue of discrimination. Forget the fact that Paula Deen got sued for it and forget her dumb luck that the lawsuit was dismissed. No one holds her up as a model of employee relations. Instead, consider the typical employer. The other day I got a call from a client who just finished interviewing a job candidate. He told me that the applicant looked like she had a medical problem and he wondered if he could ask her about it in a follow-up call. Sure, you can ask, I said — IF YOU WANT TO GET SUED. Otherwise, the answer is no. Questions about health conditions can violate the Americans with Disabilities Act. Generally, you only can ask about a disability once you have offered someone a job. Even then, you are limited to inquiring whether your new employee needs some reasonable accommodation—like a rest period or an adjustable desk—for his or her disability. Remember, I said it's complex.

Likewise, you probably know that you can't discriminate on the basis of someone's sex. But you might not realize that you could be doing just that if you ask a female job candidate if she plans on having a family. In fact, discrimination can take a variety of forms, some obvious and some not. But the results can be painful. Ask Merrill Lynch. It just paid \$160 million to settle a discrimination case.

Overall, though, the failure to pay required overtime compensation is far more common and costly for employers. Surprisingly, many fired employees believe they have a good case for discrimination, only to consult with an attorney and learn they have an ironclad case for unpaid overtime. Generally, all employees are entitled to overtime compensation if they work more than 40 hours per week—unless they are exempt. But the exemptions are difficult to understand and misconceptions abound. For example, plenty of companies think that if they pay someone a salary, that employee is automatically exempt from overtime. Wrong.

Overtime requirements are far more complicated. Consider Morgan Stanley, which paid \$42.5 million to settle a class-action lawsuit alleging that the company failed to pay overtime wages to commission-based brokers and broker-trainees. Merrill Lynch paid \$43.5 million and Wachovia paid \$39 million to stock brokers. Staples paid \$42 million to assistant store managers. Cintas Corp. paid \$22.75 million to delivery drivers. Pacific Gas & Electric paid \$17.25 million to employees who held a variety of positions and were allegedly entitled overtime compensation. Overtime cases are a growth industry. If you do nothing else, learn when you have to pay overtime.

Some common themes — and solutions — present themselves in fending off employee lawsuits.

First, many fiascos arise because businesses just don't know what employment laws actually require of them. Yes, we know these requirements are complex and abundant. But that won't help with the judge. Learn the law.

Second, even when employers are aware of the requirements, they fail to comply. For example, it's easy to say you don't discriminate. It's on virtually every company's website. But, it's entirely another matter to make sure your supervisors aren't sexually harassing employees—especially while our public officials are sexting and fondling away.

Remember we live in a there-are-no-secrets-24-hour-news-cycle-text-tweet-yelp-facebook-linked-in-you-get-the-point world. Even if you don't break the law, your business can suffer if you're just bone-headed. Ask Paula.

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